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3 Tips For Appellate Advocacy Amid Pandemic Disruptions

By Ryan Marth and Qian Julie Wang (April 13, 2020, 5:38 PM EDT)

In the past weeks we have all learned how previously routine, in-person tasks can now be handled remotely.

As appellate courts across the country have switched to remote arguments, and many have even eliminated the filing of physical paper briefs, many appellate advocates are wondering how to adapt their craft to these challenging times. Clearly some have handled it better than others, as Politico recently reported that the first arguments to take place via teleconference were “kind of a mess” and riddled with beeps, muddled voices and dropped calls.[1]

Still, skilled appellate lawyers excel at thinking on their feet, and should be able to neutralize these recent changes (or maybe even turn them to their advantage) with ample preparation. In this article, we offer three key tips that empower attorneys to handle oral arguments in the age of coronavirus with grace and force.

Know what to expect so you can prepare accordingly.

The first thing attorneys with pending appeals and arguments should do is determine how the specific court is handling operations. You can do so by calling the clerk’s office, consulting the court’s website and reaching out to other appellate counsel who practice in the same court.

Although courts across the country are issuing similar protocols, their various responses differ in key ways. As of the date of this publication, the U.S. Supreme Court has temporarily postponed all arguments.[2] The U.S. Court of Appeals for the Second Circuit, meanwhile, switched to teleconference arguments only, with parties receiving access instructions for each argument day. Parties also have the option to submit appeals on the briefs.[3]

Panels on the U.S. Court of Appeals for the District of Columbia Circuit and U.S. Court of Appeals for the Ninth Circuit have discretion to hear arguments by teleconference, postpone arguments or decide cases on the briefs. Last month, the U.S. Court of Appeals for the Fifth Circuit canceled several arguments at the last minute, indicating that each panel will now determine whether telephonic arguments are necessary.[4]

Further, the Fifth Circuit and U.S. Court of Appeals for the Eighth Circuit, along with others, temporarily suspended the requirement of filing paper copies of electronically



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submitted briefs and appendices.[5] And while the Fifth Circuit has emphasized that existing deadlines remain in place,[6] others, like the Second Circuit, have tolled certain filing dates by 21 days.[7]

If you have an appeal before a court that is currently winnowing argument time, investigate how you can emphasize to the panel the particular reasons why your case merits argument. And if argument will be done remotely, determine whether it will be by phone or video. And if the court uses new or foreign technology, seek permission to test it in advance.

Once you have the logistics nailed down, prepare accordingly. You may be in the comfort of your home, but that may mean that your space is more prone to disruptions from children, pets and errant noise. Set up a clear and controlled workspace where you can focus. Decide whether you're going to use the speaker or a headset, and test the software in advance.

Once you have the setup, use it for your moots. Just as you would moot for an in-person argument at a podium, before a bench of mock judges, calibrate your pandemic moots to reflect the real experience. It's important that, if your argument will be done by video, you run your moots in the same way so you're not self-conscious about seeing your face on the screen, or hearing audio feedback of your own voice.

Although it always helps to have the same number of mock judges on your panel as you would have on the court, it is particularly crucial in preparing for a remote argument. Mooting your argument before a three- or five-member panel, for instance, will give you a sense of how long to pause, how often to expect interruptions and how best to avoid crosstalk and lag time. It will also give you a good sense of whether the setting you've chosen for the argument is optimal, and how best to anticipate, and prevent, technological hiccups.

Moots are also a great opportunity to test drive your delivery and outfit. For instance, you can use two moots to compare the differences between delivering your arguments while standing versus sitting down. And perhaps you might decide to try to balance out the discomfort of handling an argument telephonically with the comfort of not wearing shoes, as one attorney has recently confessed to doing in a remote argument.[8] Whatever you decide to wear (or not wear), you should attend your moot in that outfit, so you can assess whether it is as comfortable and confidence-building as you expect.

Consider that your case may be decided without argument.

Because more and more courts are forgoing oral arguments and submission of paper briefs, it is crucial to prepare your briefs with the expectation that they will be read solely on a screen, and likely without oral argument. What does this mean? Essentially, it means you must count on your briefs to deliver the central points — and fast.

Where you otherwise may have presented longer, more disjointed briefs with plans to use argument time to clean it all up with a concise theme of the case and a summary of key points, you can no longer afford to do so. Nor might you want to risk taking the common approach of briefing more points than you intend to ultimately sell to the panel at oral argument. If there is a way to hone your case and boil it down, do it, and do it early, well and efficiently.

Even in the best of circumstances, you do not have the luxury of assuming that judges will read your entire brief, and that is even more the case during a pandemic, when judges are likely to be distracted by myriad other concerns. All this points to the importance of making your key points easy to find and easy to understand. Identify the one point you want the judges to take away from your brief, and then revise your brief until it's

impossible to miss that point on a skim. Take no page or word for granted.

Further, the fundamentals continue to apply — as we've noted before, prioritize readability, screen aesthetics and utility.[9] This refers to both style and substance. Avoid long sentences (those exceeding 40 words). Instead, opt for sentences that average 25 words or less. Similarly, avoid long paragraphs that comprise more than six sentences. To test whether your paragraphs are too long, scroll through and make sure that no one paragraph takes up the entire screen.

To help your reader navigate, use clear headings as anchors. Consider using bullet point lists, graphics, exhibits or other demonstratives for digestible summaries of key points that break up blocks of texts. Deploy italics instead of underlining because they offer helpful emphasis without impairing legibility or obscuring letters and punctuation.

Keep in mind that because the judges and law clerks may no longer receive paper submissions, they cannot necessarily annotate your briefs, or have your opening brief, reply brief and excerpts of record open in front of them at the same time. Make it easier on them by using PDF bookmarks and internal hyperlinks, which will allow them to jump around your submissions.

Also provide easy external navigation and use hyperlinks to as many sources as possible, including legal citations. Note that this makes it all the more crucial to check your citations and ensure that you are citing the correct source for each proposition. In the digital realm, any oversight can become glaring with just a single click.

Prepare for things to go wrong and consider adopting a different argument style.

As a common saying in appellate circles goes, there are three oral arguments in every appeal: the one you plan, the one you give and the one you wish you had given.[10] That is even more true with remote arguments. Because it will be much more difficult to assess whether the judges are receptive to your points — or whether they've even grasped them — slow down to make sure you are giving the panel time to process your statements and ask questions as they arise.

Pausing also minimizes the chances that you will talk over or interrupt a judge as she begins to frame a question. Now, as ever, listening is a critical piece of argument. Without the body language cues afforded by an in-person court appearance, attorneys must listen extremely carefully to assess the sticking points. This means not just paying attention to the judges' words, but also the tone and inflection with which they pose their questions.

Further, slowing down also creates a buffer for technological glitches. If the call drops, for instance, pausing will give you that much more opportunity to catch it and correct it. And because resolving errors and reconnecting may eat up valuable time, prepare to be flexible and adapt to anything that arises.

Stripped of the tools available in an in-person argument — body language, gestures and facial expressions — you might also consider tweaking your typical style to allow your tone and voice to do more of the talking. Evaluate whether it might be worthwhile to introduce demonstratives at argument, as court technology permits, as they may serve as helpful visual aids that supplement your new inability to gesticulate.

Most of all, though, it is important to hone arguments to a few key kernels — two to three sentences, perhaps — that will allow you to use argument time efficiently to highlight the simple reasons why your client should prevail. Then, once you have those points, consider all the angles through which you may be able to pivot back to them regardless of where the panel leads you with its questioning.

The fact that you are arguing over the phone does not give you free license to read a canned argument off of the page — if anything, it will require you to be more agile to deliver your key points effectively. This is all the more reason, though, to invest additional time into your preparation and make sure that you deliver the most zealous advocacy possible — shoes or no shoes.

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[1] Josh Gerstein, “Kind of A Mess”: D.C. Circuit Arguments Enter the Coronavirus Era, Politico (Mar. 20, 2020), <https://www.politico.com/news/2020/03/20/dc-circuit-court-cases-coronavirus-139628>.

[2] <https://www.supremecourt.gov/>.

[3] <http://www.ca2.uscourts.gov/>.

[4] <http://www.ca5.uscourts.gov/>.

[5] <http://www.ca5.uscourts.gov/>; <https://www.ca8.uscourts.gov/>.

[6] <http://www.ca5.uscourts.gov/>.

[7] <http://www.ca2.uscourts.gov/>.

[8] The attorney reflected: “It’s better in that you can set yourself up. You can even argue in your socks, if you want, which I never get to do at the D.C. Circuit.” See *supra* n.1.

[9] See Luke Hasskamp & Ryan Marth, Briefly: Preparing An Appealing Brief in the Digital Age, Minnesota Lawyer (Aug. 27, 2017), <https://minnlawyer.com/2017/08/17/briefly-preparing-an-appealing-brief-in-the-digital-age/>.

[10] See, e.g., Eric Magnuson, What I Really Meant to Say Was..., Minnesota Lawyer (Nov. 14, 2013), available at <https://www.robinskaplan.com/resources/publications/2013/11/what-i-really-meant-to-say-was>.

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